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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: WAC 02 169 53135 Office: CALIFORNIA SERVICE CENTER Date: JAN 07 2004

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a manufacturer of garment trims and accessories. It seeks to employ the beneficiary permanently in the United States as a sample maker. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on April 27, 1998. The proffered wage as stated on the Form ETA 750 is $11.50 per hour, which equals $23,920 per year.

With the petition, counsel submitted copies of the petitioner's nominal 1998, 1999, and 2000 Form 1120 U.S. Corporation Income Tax Returns. Those returns show that the petitioner reports its taxes based on a fiscal year running from July 1, though June 30.

Counsel also submitted copies of the petitioner's California Form DE-6 Quarterly Wage Reports for all four quarters of 2001. The wage reports show that the beneficiary did not work for the petitioner during 2001.

The 1998 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of $19,774 during its fiscal year from July 1, 1998 to June 30, 1999. The corresponding Schedule L shows that the petitioner had negative net current assets at the end of that year.

The 1999 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of $3,041 during the fiscal year running from July 1, 1999 to June 30, 2000. The corresponding Schedule L shows that the petitioner had negative net current assets at the end of that year.

The 2000 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of $6,524 during the fiscal year running from July 1, 2000 to June 30, 2001. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $5,841 and current liabilities of $2,417, which yields net current assets of $3,424.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on June 18, 2002, requested additional evidence pertinent to that ability. The Service Center stipulated that the evidence should be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The Service Center also requested that the petitioner provide copies of its Form W-2 Wage and Tax Statements, its Form W-3 transmittals, and its 2001 tax returns.

In response, counsel submitted the petitioner's 2001 W-2 and W-3 forms. Those forms show that the petitioner did not employ the beneficiary during 2001.

Counsel also provided a copy of the petitioner's nominal 2001 Form 1120 U.S. Corporation Income Tax Return. That tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of $13,482 during the fiscal year running from July 1, 2001 to June 30, 2002. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $56,918 and current liabilities of $3,723, which yields net current assets of $53,195.

In a letter dated September 9, 2002, which accompanied the

petitioner's response to the director's request for evidence, counsel argued that the petitioner's gross receipts, total income, depreciation, wage expense, and taxable income show its ability to pay the proffered wage. Counsel stated that the beneficiary, once hired, would replace some temporary or part-time employees, but provided no evidence in support of that statement. Counsel also asserted the beneficiary's expertise will attract additional business to the petitioner, but provided no evidence of that assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on September 23, 2002, denied the petition.

On appeal, counsel argues that the Service Center did not ask for additional evidence pertinent to 1998, 1999, or 2000, but only for the petitioner's 2001 tax return. Counsel observes that the decision of denial ignored the amount of the petitioner's wage and salary expense and the amount of the petitioner's depreciation deduction. Counsel states that the petitioner paid $43,000 to reduce the balance due on a line of credit and a loan during 2001, and that those amounts were not included in the determination of the petitioner's ability to pay the proffered wage.

Counsel observes that the petitioner had total assets of $100,883 and retained earnings of $20,693 at the end of 1998. Counsel claims, therefore, that the director erred in stating that the petitioner had negative assets. Counsel made similar assertions pertinent to the other salient years.

Counsel also appears to imply that the petitioner's depreciation deduction, because it does not represent a cash expenditure, should be added back to income in the determination of the petitioner's ability to pay the proffered wage.

Finally, counsel notes that, because income tax returns were not designed as a barometer of a company's financial health, the figures on the petitioner's tax return are not necessarily indicative of the petitioner's actual cash position.

Initially, the AAO notes that the Service Center did, contrary to counsel's assertion, ask for "evidence of the petitioner's ability to pay the beneficiary's wage . . . . at the time the priority date [was] established and continuing until the beneficiary obtains lawful permanent residence." That constituted a request for evidence of the petitioner's continuing ability to pay the proffered wage during all salient years.

Counsel cites the petitioner's total assets and retained earnings as an index of the petitioner's ability to pay the proffered wage. Counsel's reliance on the petitioner's total assets and retained earnings is misplaced. Neither the total assets nor the retained earnings of a company represent funds available for disposition.

In the decision, the director stated that the petitioner had negative cash assets at the end of 1998. In fact, the Schedule L shows that the petitioner's cash, current assets, and net current assets were all negative at the end of that year. This is not contradicted by the petitioner having reported positive total assets, contrary to counsel's assertions.

The petitioner's year-end current assets are calculated by adding the assets shown on Schedule L, lines 1(d) through 5(d). The petitioner's year-end current liabilities are calculated by adding lines 15(d) through 17(d). The petitioner's year-end net current assets, the current assets net of the current liabilities, are calculated by subtracting the petitioner's current liabilities from its current assets. Analysis of a petitioner's net current assets is critical since these are assets that can reasonably be expected to be converted to a cash or a cash equivalent within the year less any financial encumbrances on the assets. Thus, net current assets, if greater than the proffered wage, would evidence the petitioner's ability to pay the proffered wage.

In counsel's discussion of tax accounting, counsel asserts that tax returns are often a poor indicator of a company's ability to pay a proffered wage. Pursuant to 8 C.F.R. § 204.5(g)(2), however, the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely upon tax returns to demonstrate its ability to pay the proffered wage, but chose to. The petitioner might, in the alternative, have provided annual reports or audited financial statements, but chose not to. Having made this election, the petitioner's assertion made through counsel, that its tax returns, with which it chose to demonstrate its ability to pay the proffered wage, are a poor indicator of that ability, is dubious.

Counsel is correct that a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *see also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation to each given year. The petitioner may not now shift that expense to some other year as convenient to his present purpose, nor treat it as a fund available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh, supra* at 532; *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The priority date is April 27, 1998. The proffered wage is $23,920 per year. The petitioner did not provide its fiscal year 1997 tax return, although the petitioner's fiscal year 1997 included the priority date. Therefore, the record contains no evidence pertinent to the petitioner's ability to pay the proffered wage from the priority date until June 30, 1998, the last day of the petitioner's 1997 fiscal year. The petitioner has not demonstrated the ability to pay the proffered wage during that period.

During fiscal year 1998, the petitioner declared a taxable income before net operating loss deduction and special deductions of $19,774. The corresponding Schedule L shows that the petitioner had negative net current assets at the end of that year. The petitioner has not demonstrated the ability to pay the proffered wage out of either its income or its net current assets. Thus, the petitioner has not demonstrated the ability to pay the proffered wage during its fiscal year 1998.

During its fiscal year 1999, the petitioner declared a taxable income before net operating loss deduction and special deductions of $3,041. At the end of that fiscal year, the petitioner had negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage out of either its income or its net current assets during that fiscal year. Thus, the petitioner has not demonstrated the ability to pay the proffered wage during its fiscal year 1999.

During its fiscal year 2000, the petitioner declared a taxable income before net operating loss deduction and special deductions of $6,524. At the end of that fiscal year the petitioner had net current assets of $3,424. The petitioner has not demonstrated the ability to pay the proffered wage out of either its income or its net current assets during that fiscal year. Thus, the petitioner has not demonstrated the ability to pay the proffered wage during its fiscal year 2000.

During it fiscal year 2001, the petitioner declared a taxable income before net operating loss deduction and special deductions of $13,482. At the end of that year, however, the petitioner had net current assets of $53,195. The petitioner would have been able to pay the proffered wage out of its net current assets. Thus, the petitioner has demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during the period from the priority date to the end of its fiscal year 1997, during its fiscal year 1998, during its fiscal year 1999, and during its fiscal year 2000. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.